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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

WELLS FARGO BANK, N.A.,

Plaintiff, Cross-defendant and Respondent,

v.

ATASCADERO FORD, INC., et al.,

Defendants, Cross-complainants and Appellants.

2d Civil No. B209463
(Super. Ct. No. 051070)
(San Luis Obispo County)

Atascadero Ford, Inc., and Allen R. Yarborough appeal from a judgment entered following orders granting Wells Fargo Bank, N.A.'s (Wells Fargo) motions for summary judgment on Wells Fargo's complaint and on appellants' cross-complaint.

Appellants contend summary judgment should not have been granted because triable issues of fact exist as to whether loan guaranties signed by appellants are enforceable, whether Wells Fargo fraudulently induced appellants to release their claims against Wells Fargo, and whether Wells Fargo engaged in grossly negligent conduct. We affirm.

FACTS

The following facts are undisputed: In January 2000, Wells Fargo's predecessor extended a line of credit to Fleetcars.com (Fleetcars) for $1 million. Appellants each personally guaranteed the loan. The guaranties contained fee provisions and integration clauses. In May 2000, the credit line was increased to $3 million. Appellants personally guaranteed the increased line.

It is undisputed that in 2001, Fleetcars failed to repay advances that were due. Wells Fargo declared the loan to be in default. In September 2001, Wells Fargo terminated the credit line agreement and demanded that appellants honor their guaranties. Appellants filed a derivative action against Fleetcars.

Wells Fargo and appellants executed a forbearance agreement in November 2001. The agreement was amended twice, extending the time for repayment. Appellants were represented by counsel in the forbearance negotiations. Appellants made timely payments under the amended forbearance agreement until September 2005, reducing the principal to $120,888.78.

A dispute arose between appellants and Wells Fargo concerning production of documents in the derivative action. In September 2005, appellants notified Wells Fargo that they would make no further payments. Wells Fargo declared the guarantors to be in default.

Wells Fargo filed this complaint for breach of guaranty and breach of forbearance agreement against appellants. Appellants cross-complained for breach of contract, breach of implied covenant of good faith and fair dealing, gross negligence, and to set aside the forbearance agreement based on fraudulent inducement. Appellants alleged that Wells Fargo was grossly negligent in its administration of Fleetcars' credit line, failed to promptly execute on collateral, and fraudulently induced the forbearance agreements by falsely promising to produce documents that could be used to trace loan collateral.

Wells Fargo moved for summary judgment on its complaint on the grounds that it had established breach of the guaranties and of the forbearance

agreement as a matter of law and there was no defense to the action. Wells Fargo also moved for summary judgment of appellants' cross-complaint on the grounds that appellants' claims were based on obligations that appellants had expressly released, were time barred and were based on obligations that were not part of the contractual agreements between the parties. The trial court granted both motions and entered judgment in favor of Wells Fargo.

In addition to the undisputed facts set forth above, Wells Fargo submitted the declaration of F. Michael Yee, Wells Fargo's vice-president and custodian of records. Yee declared, based on his review of business records, that Wells Fargo performed all the conditions, covenants and promises required to be performed in accordance with the agreements between the parties. Wells Fargo also submitted copies of its business records and excerpts of appellants' discovery responses and the deposition of appellant Allen Yarborough.

Wells Fargo's records included written releases of all claims against Wells Fargo, except claims for gross negligence or intentional misconduct. In the November 2001 forbearance agreement, appellants released Wells Fargo from all claims and obligations "in any way arising out of, connected with or related to: (y) the negotiation, making, operation, administration and enforcement of the Loan [to Fleetcars] or the Guaranties . . . and (z) any . . . involvement . . . in respect of . . . [Fleetcars]'s business, operations and affairs . . . ." Excluded from this release were claims based on "gross negligence or intentional misconduct." Appellants also acknowledged that their guaranties were "legal, valid and binding" and "enforceable."

In an April 2002 amendment to the forbearance agreement, appellants agreed that the previous releases remained in effect and also released any claims based on "'the alleged failure of [Wells Fargo] to comply fully or timely . . .'" with subpoenas served in 2001 by appellants upon Wells Fargo in the derivative action. Again, gross negligence and intentional misconduct were excluded.

In a May 2003 amendment to the forbearance agreement, appellants agreed that the previous releases remained in effect. They also released any claims based on "any matters or circumstances relating to that [derivative] litigation captioned Allen Yarborough v. Fleetcars . . . ." Gross negligence and intentional conduct were excluded.

Yarborough's deposition testimony establishes that he knew by August 2001 that Wells Fargo had failed to conduct proper audits, had failed to verify vehicle and sales information pertaining to advances to Fleetcars, that it advanced money against nonexistent vehicles, and that it made a side agreement with Di Ricco of Fleetcars that altered the terms of the credit facility after Fleetcars' default.

In opposition to Wells Fargo's evidentiary showing, appellants offered the declaration of Yarborough, business records of Wells Fargo generated during the administration of the credit line, and excerpts from Wells Fargo's discovery responses and depositions excerpts. These Wells Fargo records show that in June 2001, Fleetcars had made late payments and Wells Fargo suspected Fleetcars was using proceeds of sales for purposes other than repayment. Wells Fargo conducted an audit and discovered that Fleetcars' records were inadequate. Excerpts of the deposition of the auditor demonstrate that Wells Fargo's audit was not thorough. The records showed that at the end of June 2001, Fleetcars defaulted on a $597,000 advance. Fleetcars representative, Di Ricco, reported that Fleetcars had no money and did not know the status of its receivables. Wells Fargo declared Fleetcars' default. Yarborough declared that Wells Fargo did not notify him of the foregoing events.

The submitted records show that at the end of June 2001, Di Ricco agreed to pay $250,000 biweekly on behalf of Fleetcars. In exchange, Wells Fargo agreed to suspend the default. Yarborough declares that he was not informed of this agreement and that Wells Fargo's failure to timely execute on the collateral allowed Fleetcars to disburse the collateral. Yarborough declares (without documentation)

that on July 2, 2001, Di Ricco deposited $315,000 into an account and disbursed it to himself and to others. Wells Fargo made no advances to Fleetcars after June 2001. Deposition testimony and records submitted by appellants show that in August 2001, Wells Fargo conducted another audit, which was also deficient.

The guaranties state that each appellant "waives any right to require [Wells Fargo] . . . (b) [to give] . . . notice of any action or nonaction on the part of [Fleetcars], [Wells Fargo]. . . (c) to resort for payment or . . . proceed directly against or exhaust any collateral held by [Wells Fargo] from [Fleetcars] . . . (f) to pursue any other remedy within [Wells Fargo's] power; or (g) to commit any act or omission of any kind, or at any time, with respect to any matter whatsoever."

The promissory note for the underlying credit line states that Wells Fargo "may delay or forgo enforcing any of its rights or remedies under this Note without losing them. [Fleetcars] and any other person who signs, guarantees or endorses this Note, to the extent allowed by law, waive presentment, demand for payment, protest and notice of dishonor. . . . All such parties agree that [Wells Fargo] may renew or extend (repeatedly and for any length of time) this loan, or release any party or guarantor or collateral; or impair, fail to realize upon or perfect [Wells Fargo]'s security interest in the collateral; and take any other action deemed necessary by [Wells Fargo] without the consent of or notice to anyone. All such parties also agree that [Wells Fargo] may modify this loan without the consent of or notice to anyone other than the party with whom the modification is made."

The trial court found that the evidence was insufficient, as a matter of law, to establish gross negligence on the part of Wells Fargo, or to establish that the releases were fraudulently induced. The guaranties and forbearance agreements were enforceable and Wells Fargo had established that it was entitled to judgment as a matter of law.

Following entry of judgment, Wells Fargo sought awards of prejudgment interest and $114,407 in attorneys' fees. The trial court awarded

prejudgment interest at the rate requested by Wells Fargo but for a shorter period of time. The trial court awarded $93,750 in attorneys' fees.

DISCUSSION

Summary judgment is properly granted if the papers submitted establish that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The moving party has the initial burden of establishing that the action has no merit or that there is no defense to the action. (*Id.*, subds. (a) & (p).) If that burden is carried, the burden shifts to the opposing party to show a triable issue of material fact. (*Id.*, subd. (p).) We review an order granting a summary judgment motion de novo. (*Saelzer v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.)

The undisputed evidence establishes all of the elements of breach of the guaranty and forbearance agreements. Wells Fargo was entitled to judgment on its complaint unless there is a triable issue of fact with respect to appellants' defenses: grossly negligent loan administration or fraudulent inducement. The undisputed evidence also establishes that appellants released their cross claims, unless there was gross negligence or the releases were fraudulently induced.

Evidence of Gross Negligence

Gross negligence is the want of even scant care or an extreme departure from the ordinary standard of conduct. (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1185-1186.) "Generally it is a triable issue of fact whether there has been such a lack of care as to constitute gross negligence [citations], but not always." (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 358, citing *Pacific Bell v. Colich* (1988) 198 Cal.App.3d 1225, 1240 & *DeVito v. State of California* (1988) 202 Cal.App.3d 264, 272.)

In *Eastburn*, allegations that the defendants failed to promptly respond to a 911 call after a child was electrocuted in a bathtub were insufficient to establish gross negligence as a matter of law. In *DeVito*, allegations that the state knew there was a fire hose dangling from a tree and knew others had been injured

by swinging from similar items in the area were insufficient to establish gross negligence as a matter of law. In *Decker*, evidence that defendant prevented bystanders from assisting in a surf rescue and that defendant used a disfavored rescue method was insufficient to create a triable issue of fact as to gross negligence.

Here, appellants presented 84 additional facts supported by evidence of Wells Fargo's conduct that could support a finding of negligent administration of the loan or negligent auditing. However, the evidence could not support a finding that there was an extreme departure from the ordinary standard of conduct. Appellant submitted no expert testimony that would establish banking conduct standards and there is no evidence of extreme conduct by Wells Fargo.

Much of the conduct in which Wells Fargo engaged was expressly contemplated by the parties' agreements. Appellants offer evidence that when Fleetcars defaulted, Wells Fargo did not notify appellants and did not promptly execute on the collateral. However, appellants expressly waived any right to require Wells Fargo to give "notice of any action or nonaction" or "to resort for payment or proceed directly against or exhaust any collateral."

Appellants presented evidence that Wells Fargo failed to strictly enforce the terms of the underlying credit line that were designed to ensure adequate collateral and evidence that Wells Fargo's collateral audits were not thorough. However, the agreements between the parties specifically permit Wells Fargo to delay or forgo enforcement and release Wells Fargo from claims arising from negligent administration of the loan.

Appellants offer evidence that Wells Fargo entered into a side agreement with Di Ricco without notice to appellants, delaying execution and allowing collateral to be disbursed. However, appellants agreed that Wells Fargo could modify the terms of the loan or "take any other action deemed necessary by [the] Lender without the consent of or notice to anyone."

In *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 767, the Supreme Court emphasized "the importance of maintaining a distinction between ordinary and gross negligence, and of granting summary judgment on the basis of that distinction in appropriate circumstances. [Citation.]" The evidence presented here, even viewed in the light most favorable to appellants and construing every inference in their favor, is insufficient as a matter of law to establish the extreme conduct that is necessary to prove gross negligence.

Fraudulent Inducement

Appellants contend that Wells Fargo fraudulently induced them into signing the forbearance agreements that contained the release language by falsely promising to produce documents in the derivative action. The contention is conclusively disproved by the express waiver in those agreements of any claims based on Wells Fargo's alleged failure to comply with subpoenas in the derivative action. The agreements were integrated and appellants were represented by counsel in their negotiation.[1]

Evidentiary Objections

The trial court properly overruled appellants' objections to the declaration of Yee, Wells Fargo's vice-president. Yee testified that the Fleetcars file was transferred to him in 2004 and that his knowledge of the loan prior to 2004 was based on review of business records and his knowledge of Wells Fargo's records procedures. His affidavit affirmatively described his review of Wells Fargo's records and the manner in which Wells Fargo prepares records in the ordinary course of business. To the extent that Yee was not competent to state that in 2001

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[1] Each guaranty contains an integration clause which states that the guaranty, and specified "Related Documents," constitute "the entire understanding and agreement of the parties as to the matters set forth in this Guaranty. No alteration of or amendment to this Guaranty shall be effective unless given in writing . . . ." None of the Related Documents imposed an obligation to produce documents in response to subpoena.

Yarborough told bank representatives that he "was comfortable with" their agreement with Di Ricco, or that Yee was not competent to represent that Wells Fargo fully complied with the document subpoenas, there is no prejudice to appellants because that evidence was not necessary to the success of Wells Fargo's motions.

The trial court properly sustained objections to portions of the declaration of Yarborough that described conduct of Wells Fargo and the banking activities of other persons. These were matters of which he had demonstrated no personal knowledge. (Code Civ. Proc., § 437c, subd. (d).)

Attorneys' Fees

Appellants do not dispute Wells Fargo's entitlement to fees, but contends that the fee award was excessive because it was disproportionate to the amount of principal that Wells Fargo sought to recover. We will not interfere with the award absent a clear abuse of discretion. (*Johns v. Retirement Fund Trust* (1981) 117 Cal.App.3d 113, 116.)

The guaranty and forbearance agreements allow for reasonable attorneys fees and do not require that fees be proportionate to the principal balance owed. Regardless of the amount in dispute, in order to collect it Wells Fargo was reasonably required to respond to a cross-complaint, an amended cross-complaint and a second amended cross-complaint, to engage in written discovery and depositions and to bring two motions for summary judgment requiring evidence of transactions over a period of years. Wells Fargo supported its fee request with proof of the fees incurred. The court did not abuse its discretion in making the award.

Interest Calculation

Appellants contend that prejudgment interest should have been calculated at a contractual rate of 4.75 percent rather than 10 percent. Substantial evidence supports a conclusion that the contractual rate of interest was 10 percent per annum. The forbearance agreement stipulates that interest will accrue at a

variable rate: .25 percentage points less than the prime rate. Wells Fargo sought interest at the rate of 10 percent, based on evidence that the rate fluctuated between 9 percent and 12 percent during the chargeable period and was over 10 percent for most of the chargeable period.

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Barry La Barbera, Judge

Superior Court County of San Luis Obispo

Cohen and Jacobson, Sean M. Jacobson, Lawrence A. Jacobson for Defendants, Cross-complainants and Appellants.

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